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No. 91-436

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In the Supreme Court of the United States

OCTOBER TERM, 1991

BRUCE L. BAIR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's commander violated the Fourth Amendment by ordering petitioner to submit a urine sample for urinalysis.

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OPINIONS BELOW

The opinion of the Court of Military Appeals, Pet. App. 1a-16a, is reported at 32 M.J. 404. The opinion of the Air Force Court of Military Review, Pet. App. 17a-22a, is reported at 29 M.J. 862.

JURISDICTION

The judgment of the Court of Military Appeals was entered on June 21, 1991. The petition for a writ of certiorari was filed on September 17, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Davis-Monthan Air Force Base in Arizona, petitioner, a member of the United States Air Force, was convicted of willfully disobeying a lawful order to submit a sample of his urine, and of soliciting another to violate the same lawful order by providing petitioner with a sample that he could use as his own, in violation of Articles 90 and 134, respectively, of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 890, 934. Petitioner was sentenced to a bad conduct discharge, confinement for nine months, and a reduction to the lowest enlisted rank. The Air Force Court of Military Review affirmed the findings and the sentence. On discretionary review, the Court of Military Appeals affirmed.

1. Air Force Regulation 30-2, paragraph 5-8 (Apr. 18, 1986), permits a military commander to order a servicemember to submit to drug testing when reasonable suspicion of drug abuse exists. This "command-directed" examination "may be conducted to determine a member's competency for duty and the need for counseling, rehabilitation or other medical treatment." Pet. App. 23a. The results obtained from command-directed testing may be used as the basis for various administrative actions against the servicemember, but the results may *not* be used against the servicemember in any disciplinary action under the UCMJ, nor may they be used to characterize his discharge in separation proceedings. Pet. App. 23a-24a. The question in this case is whether petitioner's commander had reasonable suspicion to order the drug testing. If there was no reasonable suspicion, petitioner maintains that his action in disobeying his commander's order could not have

resulted in a conviction, because under military law the failure to obey an unlawful order is not a crime.

2. On July 21, 1988, the police at Davis-Monthan Air Force Base received an anonymous telephone call from a woman who said that petitioner and another named airman had used marijuana the previous weekend. Pet. App. 2a-3a. Petitioner was an aircraft maintenance specialist who performed preventive maintenance on weapons control systems. Among other responsibilities, petitioner "tune[d], adjust[ed], align[ed], and calibrate[d] weapons control systems to achieve maximum operating efficiency." Tr. 14; PXs 1, 5z.

This information about petitioner was relayed through the first sergeant to Lieutenant Colonel Kind, petitioner's commander. Pet. App. 2a. Based upon the call, Colonel Kind ordered petitioner to provide a urine sample for a command-directed urinalysis. Pet. App. 3a. Colonel Kind decided to order the urinalysis to ensure that there was no illegal drug use on the military flightline and because drug use was incompatible with good aircraft maintenance. *Ibid.* At trial, Colonel Kind explained that illegal drug use on the flightline can cause injured pilots and technicians and damaged equipment. Tr. 17. He said that in his two-and-one half years as a commander, he had received numerous anonymous phone calls concerning drug use. He explained that he treated all of them as true and ordered command-directed urinalyses on all of those occasions. *Ibid.*

After receiving the order from Colonel Kind to provide a urine sample, petitioner contacted Airman First Class Gary Wacha, one of petitioner's subordinates. Petitioner admitted to Wacha that he had smoked marijuana on an earlier occasion, and he asked Wacha if he was "clean" and if he could pro-

vide petitioner with some of his urine. Wacha told petitioner that he did not know if he could do that. Petitioner then rigged a plastic bag inside his clothing and filled it with grapefruit juice and water so that the mixture would appear to be urine. When petitioner provided the putative urine sample, he actually filled the collection bottle with the grapefruit juice/water mixture. Later, petitioner told Airman Wacha "all they got was grapefruit juice and water." Wacha reported these matters, and petitioner's urine sample was seized. Subsequent testing revealed that the sample was not urine. Tr. 41-59; PXs 1-3.

3. The trial judge denied petitioner's motion to dismiss the charges on the ground that Colonel Kind's order was not lawful. The court found that Colonel Kind assumed the contents of the telephone call were true and that he ordered the urinalysis to protect flightline safety. Tr. 30. The trial judge concluded that the information provided—which included a specific identification of petitioner, a specific identification of the drug alleged to have been used, and a reference to use in the immediate past—was sufficient to create reasonable suspicion in Colonel Kind's mind, particularly in light of the hazards that the use of drugs in a flightline setting may pose for mission safety. Tr. 31-32.

4. On appeal to the Air Force Court of Military Review, petitioner again asserted that the anonymous tip did not provide Colonel Kind with reasonable suspicion to order a urinalysis. Therefore, petitioner contended, the order was not valid, and he had committed no offense by failing to obey it. The court of military review rejected his argument, ruling that the information provided to Colonel Kind was sufficient to raise a reasonable suspicion of drug abuse. Pet. App. 17a-22a.

5. The Court of Military Appeals affirmed. Pet. App. 1a-15a. It concluded that Colonel Kind had reasonable suspicion that petitioner may have used marijuana. *Id.* at 13a-14a. The court also noted that the risk and type of harm that could be caused by a drug-impaired servicemember was relevant to the reasonable suspicion determination. *Id.* at 15a.

ARGUMENT

Petitioner maintains that Colonel Kind's order directing petitioner to submit a urine sample for urinalysis was unlawful since the colonel lacked reasonable suspicion that petitioner had used marijuana. That claim does not warrant review by this Court.

1. There is no conflict among the circuits on the question presented. The Court of Military Appeals has consistently held that servicemembers may be subjected to compulsory or random drug testing, see *United States* v. *Bickel*, 30 M.J. 277 (C.M.A. 1990); *Unger* v. *Ziemniak*, 27 M.J. 349 (C.M.A. 1989); *Murray* v. *Haldeman*, 16 M.J. 74 (C.M.A. 1983), and the only federal court of appeals to address that issue has agreed with the military courts, *Committee for GI Rights* v. *Callaway*, 518 F.2d 466 (D.C. Cir. 1975). No other court has addressed the question of whether a servicemember may be required to undergo reasonable-suspicion-based drug testing; only one other court of appeals has addressed whether a government employee may be required to undergo drug testing based on reasonable suspicion of on-duty or off-duty drug use, and the decision there is consistent with the one below. In *NTEU* v. *Yeutter*, 918 F.2d 968 (D.C. Cir. 1990), the court held that the Fourth Amendment permits the reasonable-suspicion-based drug testing of government employees who are suspected of on-duty

drug use or having drug-impaired work performance. 918 F.2d at 972-974. The court also upheld reasonable-suspicion-based drug testing of government employees who hold safety- or security-sensitive positions and who are suspected of off-duty drug use, even in the absence of reasonable suspicion of either on-duty drug use or drug-impaired work performance. *Id.* at 974-975.

2. Petitioner argues that the decision below is inconsistent with this Court's Fourth Amendment decisions, particularly *Alabama* v. *White*, 110 S. Ct. 2412 (1990). Pet. 5-8. What petitioner fails to take into account, however, is that this case involves not only a member of the armed forces, but also a servicemember who was in a safety-sensitive position of special importance. Both factors are critical to the proper analysis of this question.

This Court has often made clear that the military is "a specialized society separate from civilian society," *Parker* v. *Levy*, 417 U.S. 733, 743 (1974), and that the essential function of the military is "to fight or be ready to fight wars should the occasion arise," *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11, 17 (1955).* For those reasons, the Court has always considered the unique needs of the armed forces when determining how the Constitution applies to servicemembers. *E.g.*,

* See *Schlesinger* v. *Councilman*, 420 U.S. 738, 757 (1975) ("To prepare for and perform its vital role, the military must insist upon a respect for duty and a discipline without counterpart in civilian life. The laws and traditions governing that discipline have a long history; but they are founded on unique military exigencies as powerful now as in the past. Their contemporary vitality repeatedly has been recognized by Congress."). See also *Burns* v. *Wilson*, 346 U.S. 137, 140 (1953) (plurality opinion) ("the rights of men in the armed forces must perforce be conditioned to meet certain overriding demands of discipline and duty").

Goldman v. *Weinberger*, 475 U.S. 503 (1986); *Brown* v. *Glines*, 444 U.S. 348 (1980); *Parker* v. *Levy*, *supra*. See *NTEU* v. *Von Raab*, 489 U.S. 656, 671 (1989) ("those who join our military * * * services * * * may expect intrusive inquiries into their physical fitness for those special positions"). Petitioner thus errs in assuming that the Fourth Amendment rules applicable in civilian life can automatically be transferred unchanged to the armed forces.

In addition, the Court has explained that consideration of the constitutionality of investigative searches and seizures "involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." *Brown* v. *Texas*, 443 U.S. 47, 50-51 (1979). The military has a compelling interest in preventing drug use by servicemembers given both the debilitating effects that drug use can have on military discipline and readiness, as well as the safety concerns that drug use can raise in a military setting. See *Schlesinger* v. *Councilman*, 420 U.S. at 760-761 n.34; *Committee for GI Rights* v. *Callaway*, 518 F.2d at 476; *United States* v. *Bickel*, 30 M.J. at 282-283; *United States* v. *Trottier*, 9 M.J. 337, 345 (C.M.A. 1980); S. Rep. No. 53, 98th Cong., 1st Sess. 11 (1983); H.R. Rep. No. 433, 92d Cong., 1st Sess. 28 (1971). See generally *Williams* v. *Secretary of the Navy*, 787 F.2d 552, 553-555 & n.1 (Fed. Cir. 1986) (discussing congressional findings and inquiries). As the Court of Military Appeals explained in *United States* v. *Trottier*, 9 M.J. at 345-346 (footnote omitted):

> As military equipment has become more sophisticated, there is the concomitant increased risk that an operator will be unable to handle the

> complicated weapons system with which he is entrusted and upon which his safety and that of others may depend. This risk, disturbingly, often cannot be obviated by keeping a person under the influence of a drug off the job for, unlike use of alcohol, there frequently are only marginally visible indications of the influence of drugs. Even when the user is not then under the influence, there may be dangerous psychological pressures on him which, themselves, could affect his performance adversely.

The Court of Military Appeals was therefore correct in recognizing that the risk and type of harm that a servicemember could cause is relevant in determining whether it is reasonable to subject him to drug testing in petitioner's circumstances. Pet. App. 15a.

Those principles govern this case. Petitioner was not a file clerk; he was an aircraft maintenance specialist, responsible for maintaining sophisticated and potentially dangerous weapons control systems. He was accused of using a drug that could adversely affect his ability to perform his mission, which, in turn, could pose a danger to the pilot of the aircraft he maintained or to others, including civilians. Under these circumstances, it was not unreasonable for Colonel Kind to order petitioner to submit a urine sample for drug testing in order to ensure that petitioner would not put his mission at risk.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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